Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

LESLIE D. MOWER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW:

I. Did the Tenth Circuit Court of Appeals misapply the *Slack v. McDaniel* standard ["reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further"]when it denied a Certificate of Appealability?

II. Whether Defense Counsel's neglect of an exculpatory defense is cured by a post hoc claim it was trial strategy under *Strickland v. Washington*'s presumption that counsel "rendered adequate assistance"?

LIST OF ALL PARTIES

The parties to this matter include Leslie D. Mower and The United States of America.

CORPORATE DISCLOSURE STATEMENT

This appeal is not made by or in behalf of any corporation. Therefore, there is no parent or publicly held company owning 10% or more of the corporation's stock relevant to this matter.

UNITED STATES SUPREME COURT

Leslie D. Mower v. United States of America

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THIS CASE

United States v. Mower, 2009 U.S. App. LEXIS 17893 (10th Cir. 2009).

Mower v. United States, 2008 U.S. Dist. LEXIS 64539 (D. Utah 8-22-2008).

Mower v. United States, 2008 U.S. Dist. LEXIS 32722 (D. Utah 4-21-2008).

Leslie Dee Mower, Petitioner, for her opening brief states:

STATEMENT OF JURISDICTION

(i) The date the judgment or order sought to be reviewed was entered.

The Tenth Circuit issued a written order denying a Certificate of Appealability on August 12, 2009, under the citation *United States v. Mower*, 2009 U.S. App. LEXIS 17893 (10th Cir. 2009).

The Tenth Circuit issued a written order denying the Petition for Rehearing on October 2, 2009. A copy of the order is attached as Appendix Exhibit 3. *United States v. Mower*, No. 08-4178 (10th Cir. 2009).

(ii) Statutory provision allowing appeal.

28 U.S.C. § 1254(1) provides jurisdiction to appeal this matter to the United States Supreme Court.

APPLICABLE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

28 U.S.C. § 1254(1). Court of appeals; certiorari; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[.]

28 U.S.C. § 2253. Appeal.

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from —

(A) the final order in a habeas corpus proceeding in which the detention complained

of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

Leslie D. Mower ("Ms. Mower") asks this Court to reverse the Tenth Circuit's decision denying her a Certificate of Appealability ("COA"). This request arises from the U.S. District Court for the District of Utah's denial of Ms. Mower's petition to vacate sentence pursuant to 28 U.S.C. § 2255 on the grounds of ineffective assistance from her attorneys.

Ms. Mower was charged with one count of conspiracy and six counts of tax evasion for tax years 1992-1997. From January, 2002 until sentencing, Ms. Mower was represented by Neil A. Kaplan ("Kaplan") and Anneli R. Smith ("Smith") of the law firm of Clyde, Snow, Sessions and Swenson, P.C. (referred to throughout as "Defense Counsel").

Ms. Mower was tried jointly with her ex-husband, Tom Mower, and a former company attorney, James Thompson ("Thompson"). Without Ms. Mower's knowledge, Defense Counsel conceded all defense strategy, case management, and control of her interests to Tom Mower's counsel, effectively yielding all control of her defense. Ms. Mower was not provided a separate defense, despite having unique, exculpatory defenses available to her.

Defense Counsel failed to investigate the forgery of Ms. Mower's signature on checks and income tax returns, which documents formed the basis for the government's claims of conspiracy and tax evasion. Ms. Mower told Defense Counsel of the forgery of her signature in her first meeting with them in January 2002. Defense Counsel disregarded her unique,

exculpatory defenses arising from the forgery. They failed to timely submit checks and all six years' tax returns for examination by a forensic document examiner so that a "forgery defense" could be used by Ms. Mower in her defense of the government's claims.

Eventually Defense Counsel retained a qualified forensic document examiner (the "Expert"). However, Defense Counsel requested the examination of only two of the six years' returns (both of which were found to be forged) and none of the checks from the Resultz[1] account, a business account Ms. Mower thought had been closed many years earlier. The Expert's written opinion stated the signatures showed a strong indication of forgery. Defense Counsel failed to use the Expert's report or call the Expert to testify at trial. Defense Counsel also failed to call other witnesses who would have confirmed Tom Mower forged, or caused to be forged, Ms. Mower's signature on each of the 1992-1997 joint income tax returns and Resultz checks.

Defense Counsel failed to present Ms. Mower with offers from the government recommending a plea to a lesser offense with no jail time. Defense Counsel failed to explain to Ms. Mower the government would waive jail time in return for her testimony against other defendants in the case. Defense Counsel refused to

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[1] The government used four checks from the Resultz account as evidence of the tax conspiracy to convict Ms. Mower, though a forgery defense would have proven the signatures were not genuine and supported a finding that Ms. Mower was excluded from the conspiracy.

allow Ms. Mower to testify. They failed to disclose to Ms. Mower their joint defense strategy to keep her a party to obtain a lesser sentence for Tom Mower.

Defense Counsel forfeited Ms. Mower's unique, exculpatory defense because they yielded control of the case to Tom Mower's counsel. Tom Mower's attorneys believed he would receive a lesser punishment from a jury if Ms. Mower were a joint party with him at trial. To that end, Defense Counsel failed to put on a separate defense and failed to sufficiently cross-examine witnesses to challenge the government's evidence whenever it could have harmed Tom Mower's interests. And, in spite of her demands to testify, they refused. But for Defense Counsel's failures, the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984).

The District Court incorrectly applied the *Strickland* standard for a motion to vacate sentence based on ineffective assistance of counsel. *Id.* It applied a more onerous standard of proof than what is required by law and granted inappropriate deference to Defense Counsel. The District Court should have considered only Defense Counsel's conduct in representing Ms. Mower and not their reputation and experience, which is entirely irrelevant. Reputation is unrelated to conduct in any given case.

Ms. Mower appealed the District Court's decision to the Tenth Circuit, which denied her a COA and dismissed her appeal. The Tenth Circuit's decision was in error. There is a lack of uniformity in the

application of the requirement for a COA in different circuit courts. *See Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000); *Jefferson v. Welborn*, 222 F.3d 286, 289 (7th Cir. 2000); *c.f. United States v. Mower*, 2009 U.S. App. LEXIS 17893 (10th Cir. 2009). This case gives the Supreme Court the opportunity to set a clear precedent on the purpose of a COA. This Court should reverse the Tenth Circuit's decision and remand for issuance of a COA.

I. Facts.

Ms. Mower was married to Tom Mower for over 20 years. They divorced approximately five years before the trial of this case. The charges for which Ms. Mower was convicted stemmed from pre-divorce joint income tax returns filed for years 1992-1997. *See United States v. Thompson*, 518 F.3d 832, 838 (10th Cir. 2008).

During their marriage, the Mowers formed a multi-level marketing company, which became known as Neways, Inc. *Id.* Thompson was Neways' general counsel for approximately one-and-a-half years (from the spring of 1996 to the summer of 1997). Thompson was convicted of conspiracy to evade taxes. *Id.*

Neways, Inc., formed several subsidiary and associate entities to manage its domestic and foreign sales, all of which are referred to as "Neways." *Id.* Neways' financial operations were complex and involved lawyers and accountants who computed the taxes and prepared the returns.

The government obtained indictments against the Mowers for tax evasion and conspiracy to evade taxes based upon their personal income tax returns for tax years 1992-1997. *Id.* Though the government alleged only a limited involvement by Ms. Mower with what it claimed was criminal conduct, she was nevertheless tried jointly with the other defendants. *Id.* Ms. Mower was a victim of the tax evasion strategy designed and carried out by the other defendants. She was not part of the conspiracy. She was further victimized when Defense Counsel forfeited her unique, exculpatory defense when they surrendered all defense strategy to Tom Mower's defense.

The government's evidence of a conspiracy included a forged loan document prepared by Thompson, signed by Tom Mower, but not by Ms. Mower; income tax returns on which her signature was forged; and the forged Resultz checks. *Id.* at 840. Defense Counsel knew forgery was an issue in this case at the beginning. The Expert confirmed the signatures on the only two returns he examined were forged. *See Mower v. United States of America*, case no. 2:08-cv-00005-TC (hereinafter "District Court Docket"), no. 2, Exhibit 1. Defense Counsel unreasonably delayed their investigation until after three trial continuances and received the Expert's limited report only three days before trial. *Id.* When finally done, the investigation was limited to two tax returns and no Resultz checks. *Id.* Defense Counsel presented nothing to the jury by way of a forgery defense because of the joint-defense strategy with Tom Mower's counsel and their disregard for Ms. Mower's individual right to a separate and adequate defense.

Following a two-week trial, using a general verdict form, the jury returned a guilty verdict against the Mowers and Thompson on all counts. *United States v. Thompson*, 518 F.3d at 849. Ms. Mower was sentenced to twenty-seven months imprisonment and has served her prison sentence and is now on supervised release. *Id.*

Ms. Mower filed a Motion to Vacate Sentence, pursuant to 28 U.S.C. § 2255. (*See* District Court Docket, no. 1.) The motion was based on the ineffective assistance of Defense Counsel. (*Id.*) The District Court held an evidentiary hearing on June 13, 2008, and denied her motion on August 22, 2008. (*Id.* at no. 37, transcript at no. 39.) During the hearing and in the decision, the District Court gave complete deference to Defense Counsel, abrogating Ms. Mower's constitutional right to effective assistance of counsel. (*Id.*) Ms. Mower appealed to the Tenth Circuit, which issued a written order summarily dismissing her appeal because "Ms. Mower has not met the requirements for a COA." (Appendix Exhibit 1, Order Denying Certificate of Appealability, Appendix p. 3a.)

Ms. Mower petitions this Court to review the errors and inconsistencies in the application of Supreme Court decisions and reverse the Tenth Circuit.

ARGUMENT

The United States Supreme Court "has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability [COA] by a circuit judge or

a panel of a court of appeals." *Hohn v. United States*, 524 U.S. 236, 253 (1998) (*citing* 28 U.S.C. § 1254(1)).

"'The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (*citing Slack v. McDaniel*, 529 U.S. 473, 482 (2000)). Section 2253(c) "permits the issuance of a COA only where a petitioner has made a 'substantial showing of the denial of a constitutional right.'" *Id.* at 336 (*citing* 28 U.S.C. § 2253(c)). Thus, a petitioner must show "'that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *Id.* (*citing Slack*, 529 U.S. at 484). Thus, "a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* at 337.

At the COA stage, "a court need not make a definitive inquiry into [the merits of petitioner's constitutional claims]." *Id.* at 342. Instead, "a COA determination is a separate proceeding, one distinct from the underlying merits." *Id.*; *see also Hohn*, 524 U.S. at 241. "Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA. The question is the debatability of the underlying constitutional claim, not the resolution of the debate." *Id.*

Contrary to the Supreme Court's direction, the Tenth Circuit went beyond the question of whether a

COA should be granted and simply deferred to the District Court's conclusion. Thus, the decision denying a COA was in error. Ms. Mower made the required substantial showing that reasonable jurists could debate whether the District Court correctly denied her habeas relief. The evidence presented by Ms. Mower proved Defense Counsel failed to independently and adequately represent her. They failed to present evidence of forgery of the critical income tax returns and Resultz checks, failed to present expert witness testimony of the forgeries, failed to allow Ms. Mower to testify in her own behalf, failed to present other witness testimony that would have exonerated Ms. Mower, and failed to present Ms. Mower with settlement offers that would have avoided trial and prison. This Court should reverse the Tenth Circuit's decision denying Ms. Mower a COA.

I. The Tenth Circuit misapplied the *Slack v. McDaniel* standard ["reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further"] when it denied a Certificate of Appealability.

Ms. Mower sought to vacate her conviction for conspiracy and tax evasion because she received ineffective assistance of counsel. In considering Ms. Mower's requested relief, both the District and Circuit Courts misapplied the *Slack* standard. Rather than allow her appeal to proceed and be determined on the merits, the Tenth Circuit denied Ms. Mower a COA.

In *Slack*, this Court held a COA would issue if "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484. The statutory requirement for a COA (previously called a "certificate of probable cause") came about because of abuses of habeas proceedings by inmates. *Van Pilon v. Reed*, 799 F.2d 1332, 1335 (9th Cir. 1986). "[T]he purpose of the requirement of a certificate of probable cause [CPC] is to prevent abuse of the writ through frivolous appeals." *Id.* However, "**any doubts** whether CPC should be issued **are to be resolved in favor of the petitioner.**" *Buxton v. Collins*, 925 F.2d 816, 819 (5th Cir. 1991) (emphasis added).

The requirement of a COA was codified at 28 U.S.C. § 2253. It states " ... (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right. (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)." *Id.* at (c)(2)-(3). "Congress established the requirement that a prisoner obtain a certificate of probable cause (CPC) [or COA today] to appeal in order to prevent frivolous appeals from delaying the States' ability to impose sentences, including death sentences." *Barefoot v. Estelle*, 463 U.S. 880, 892 (1983).

Because there is an increasing number of "death-sentenced petitioners" entering the appellate stages of

the federal habeas process "[t]he fair and efficient consideration of these appeals requires proper procedures for the handling of applications for stays of executions and demands procedures that allow a decision on the merits of an appeal accompanying the denial of a stay." *Id.* Section 2253 requires a certificate of appealability to issue if the petitioner has met the "'substantial showing' standard with respect to each issue he seeks to raise on appeal." *Lambright*, 220 F.3d at 1024.

The legislative purpose states "[t]his title [Habeas Corpus Reform] incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." 104 H.Rpt. 518 (1996).

"In non-capital as well as capital cases, the issuance of a COA is not precluded where the petitioner cannot meet the standard to obtain a writ of habeas corpus." *Lambright*, 220 F.3d at 1025; *see also Jefferson*, 222 F.3d at 289 (stating that a COA should issue unless the claims are "utterly without merit"); *Silva v. Woodford*, 279 F.3d 825, 833 (9th Cir. 2002) (Any doubts about whether a petitioner has met the standard for a COA must be resolved in his favor). The *Lambright* court expanded on the purpose of a COA, stating:

> The COA requirement constitutes a gate keeping mechanism that prevents [the courts] from devoting judicial resources on frivolous issues while at the same time affording habeas petitioners an opportunity to persuade [the

> court] through full briefing and argument of the potential merit of issues that may appear, at first glance, to lack merit.

Lambright, 220 F.3d at 1025.

Here, the Tenth Circuit has ignored both *Lambright* and *Jefferson* and created a new, more onerous standard. The Tenth Circuit is using the COA as a filter in non-capital cases to rule perfunctorily. Prevailing law requires the COA to be granted in this case where Ms. Mower has shown much more than speculation or conjecture of an appealable issue, but instead has demonstrated a strong case for appeal. *See Strickland*, 466 U.S. at 693-94. Ms. Mower has shown that, but for Defense Counsel's errors, the outcome of the trial would have been different. Therefore, this Court should reverse the Tenth Circuit's decision and remand for a COA.

II. Defense Counsel's neglect of an exculpatory defense was ineffective assistance of counsel, and is not cured by the post hoc claim it was trial strategy, despite *Strickland v. Washington*'s presumption counsel "rendered adequate assistance."

The Courts of Appeals are required to review *de novo* a District Court's denial of a writ for habeas relief. *See Smiley v. Maloney*, 422 F.3d 17, 20 (1st Cir. 2005); *Bowie v. Branker*, 512 F.3d 112, 117-118 (4th Cir. 2008); *Ramonez v. Berghuis*, 490 F.3d 482, 486 (6th Cir. 2006); *United States v. Day*, 285 F.3d 1167, 1169 (9th Cir. 2002); *Maynard v. Boone*, 468 F.3d 665,

669 (10th Cir. 2006) ("In an appeal of the dismissal of a federal habeas corpus petition, we review a district court's ... conclusions of law de novo"). Further, the Courts of Appeals are required to review *de novo* the District Court's determinations of whether a defendant received ineffective assistance of counsel. *United States v. Rojas-Millan*, 234 F.3d 464, 468 (9th Cir. 2000); *Wackerly v. Workman*, 580 F.3d 1171, 1175-76 (10th Cir. 2009). Thus, simple reliance on the District Court's decision is erroneous and unjustified.

Denial of effective assistance of counsel is violation of a defendant's Sixth Amendment constitutional rights. *Strickland*, 466 U.S. at 688.

> To prove ineffective assistance of counsel, a defendant must show (1) counsel's performance fell below an objective standard of reasonableness by a preponderance of the evidence, and (2) defendant suffered prejudice, such that there is a reasonable probability that, but for counsel's errors, the outcome of the trial would have been different.

Id. at 693-94. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The prejudice defendant must demonstrate is by less than a preponderance of the evidence: "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the trial." *Id.* at 693; *see also Williams v. Taylor*, 529 U.S. 362, 405-06 (2000) (O'Connor, J., concurring); *Fisher v. Gibson*, 282 F.3d 1283, 1307 (10th Cir. 2002).

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. To overcome the presumption of reasonable professional assistance, a criminal defendant must show, by only a preponderance of the evidence, that his defense counsel acted unreasonably. *See Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986); *Salahdin v. Mullin*, 380 F.3d 1242, 1248 (10th Cir. 2004); *Alcala v. Woodford*, 334 F.3d 862, 869 (9th Cir. 2003); *Putman v. Head*, 268 F.3d 1223, 1243 (11th Cir. 2001); *Cody v. United States*, 249 F.3d 47, 52 (1st Cir. 2001); *see also Strickland*, 466 U.S. at 688 (holding, without reference to any specific evidentiary standard, that a criminal defendant "must show that counsel's representation fell below an objective standard of reasonableness"). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688.

Ms. Mower is entitled to a COA because she made a substantial showing of the denial of effective assistance of counsel. 28 U.S.C. § 2253 (2008). Her evidence at the District Court proved she had unique, exculpatory defenses based on forged signatures which Defense Counsel did not present. A reasonable jury would not find her guilty if given the opportunity to consider her unique, exculpatory defenses. Ms. Mower's evidence showed she did not get a fair trial because of Defense Counsel's conduct.

The District Court erred in not considering Defense Counsel's conduct in rendering ineffective counsel. Tenth Circuit erred in denying Ms. Mower a COA because it merely relied on the District Court's conclusion. Ms. Mower made a substantial, or certainly a debatable showing that Defense Counsel violated her constitutional rights by failing to investigate the forged signatures, failing to call an expert witness in Ms. Mower's defense, failing to introduce other exculpatory evidence at trial, and preventing Ms. Mower from testifying at her trial.

Ms. Mower's burden under *Strickland* is modest. *See Strickland*, 466 U.S. at 693-94. It requires Ms. Mower show only that the District Court's resolution of the issues raised by Ms. Mower is reasonably subject to debate. *Miller-El*, 537 U.S. at 336. It is at least debatable, if not convincing, that a jury would never convict a woman based upon tax returns she did not sign. Such proof compels the conclusion that she was not part of the conspiracy BECAUSE the conspirators forged her signatures.

Defense Counsel was alerted to the forgery defense by their client, but failed to put on evidence that Ms. Mower was not part of the conspiracy, but was the victim. *Defending* Ms. Mower without offering her unique, exculpatory defense was not only ineffective, it was tragic. An innocent woman was convicted (even Defense Counsel testified to Ms. Mower's innocence). (*See* District Court Docket, no. 39, Hearing Transcript, June 13, 2008, hereinafter referred to as "H. Tr.," 22:4-7.) This at least raises a debatable question for which a COA should have been granted.

Defense Counsel's claim that they considered and rejected the forgery defense for strategic reasons is not sufficient to deny Ms. Mower a COA. To be constitutionally ineffective, Defense Counsel's "strategic decision must have been completely unreasonable, not merely wrong." *Romano v. Gibson*, 278 F.3d 1145, 1153 (10th Cir. 2002) (quotation and citation omitted). "Counsel ... may make a reasonable decision that investigation is unnecessary." *Wallace v. Ward*, 191 F.3d 1235, 1247 (10th Cir. 1999). However, the failure to investigate a potential defense strategy without any strategic basis for doing so may constitute ineffective assistance. *Strickland*, 466 U.S. at 690-91. Defense Counsel's performance is assessed from Defense Counsel's "perspective at the time of that performance, considered in light of all the circumstances." *Medina v. Barnes*, 71 F.3d 363, 368 (10th Cir. 1995). As a result, "[w]hen an attorney fails to examine potentially exculpatory evidence, although he repeatedly assured the petitioner of his intention to do so, the *Strickland* presumption that the failure is 'sound trial strategy' is surmounted." *Jones v. Wood*, 114 F.3d 1002, 1011 (9th Cir. 1997).

Defense Counsel's failure to offer an independent defense for Ms. Mower was unreasonable. Although Defense Counsel argues they rejected the forgery defense for strategic reasons, the court is "not required to condone unreasonable decisions parading under the umbrella of strategy[.]" *Moore v. Johnson*, 194 F.3d 586, 604 (5th Cir. 1999). Defense Counsel's decision to exclude exculpatory evidence, when it provides **no benefit** to the defense but instead **prejudices** the defendant by preventing the jury from hearing a

plausible alternative defense theory, is professionally unreasonable. *Id.* at 611 (emphasis added); *see e.g.*, *Baylor v. Estelle*, 94 F.3d 1321, 1324 (9th Cir. 1996); *Sims v. Livesay*, 970 F.2d 1575, 1580-81 (6th Cir. 1992).

In *Rompilla v. Beard*, 545 U.S. 374 (2005), the U.S. Supreme Court reaffirmed that an unreasonably limited investigation by defendant's counsel before trial could not withstand scrutiny under *Strickland*. Counsel in *Rompilla* conducted a seemingly thorough investigation, speaking with five family members and employing three experts who examined the defendant's mental health at the time of the offense for the purpose of establishing mitigating factors in a capital case. *Id.* at 381-82. Defendant Rompilla himself was unhelpful and even sent counsel on false leads. *Id.* at 381. Despite Rompilla's actions, this Court found counsel ineffective. *Id.* This Court relied on the ABA Standards, holding that counsel must investigate everything relevant to the penalty phase, regardless of the accused's admissions or statements. *Rompilla*, 545 U.S. at 387 (*quoting* 1 ABA Standards for Criminal Justice 4-4.1 (2d. ed 1982 Supp.)). Defense attorneys in *Rompilla* were given leads regarding information contained in court files in a prior case against him. *Id.* This Court found that knowledge of potential leads was critical in triggering the duty to continue investigating. *Id.* at 392-93.

Here, Defense Counsel were given more than "potential leads," they were given absolute direction by their client to investigate forged signatures. They did not bother to investigate the Rezults checks (which go

to Ms. Mower's alleged involvement in a conspiracy) or timely follow-up on the information given by their client. Defense Counsel submitted only two of six years' tax returns for review by the Expert. (See District Court Docket, no. 2, Memorandum in Support of Motion to Vacate, Set Aside or Correct Sentence, Exhibit A, p. 4-5.) Ms. Mower was deliberately excluded by the conspirators (Tom Mower and Thompson) from their tax evasion conspiracy. She was so completely uninvolved the conspirators resorted to forging her signatures.

Defense Counsel's failures are further evident by their own testimony at the evidentiary hearing, when questioned about hiring the Expert:

The Court:	Before you hired the forensic expert, did you and your client, Ms. Mower, talk about whose signature it was on the '94 [tax return]?
The Witness:	There were a lot of issues about whose signature was on that, quite frankly, and not just that document but others.

(*See* Hr. Tr. 106:23-25; 107:1-3.) Thus, Defense Counsel acknowledged there were other documents, in addition to the 1994 tax return, they believed were forged, yet they did not send any of those documents to the Expert for review. Certainly, such a failure to investigate falls squarely within this Court's reasoning under *Rompilla*, that an unreasonably limited

investigation by counsel before trial could not withstand scrutiny under *Strickland*. *Rompilla*, 545 U.S. at 392-393. The District Circuit failed to apply this Court's clear standard. The Tenth Circuit therefore erred in denying the COA.

Neither the District Court nor the Tenth Circuit addressed Defense Counsel's failure to investigate. A decision to not investigate cannot be deemed reasonable if it is uninformed. *Fisher*, 282 F.3d at 1296 (*citing Strickland*, 466 U.S. at 691). It is ineffective assistance of counsel to disregard an expert report specifically recommending further diagnostic investigation. *Hooper v. Mullins*, 314 F.3d 1162, 1170-71 (10th Cir. 2002). Here, Defense Counsel were in possession of the Expert's report, which specifically stated "[t]he questioned signatures on [the 1993 tax return] and [the 1994 tax return] of Leslie Mower show a strong indication of being written by someone other than [Leslie Mower]." (District Court Docket, no. 2, Memorandum in Support of Motion to Vacate, Set Aside, or Correct Sentence, Exhibit A, p. 2.) The Expert's report gave Defense Counsel proof of forgery on two years' returns. (*Id.*) Further investigation was required.

As soon as Defense Counsel received the Expert's report, they should have thoroughly investigated the forgery and used the information from the report in Ms. Mower's defense; however, they did nothing. They did not send the remaining tax returns and the Resultz checks for verification, the did not call the Expert to testify, and they did not use what they had at trial.

Because of Defense Counsel's unreasonable delay, they remained uninformed at the time of trial.

After the fact, Defense Counsel claim "defense strategy" as the reason for not investigating the forgeries any further, the fact is, evidence relating to the defense of forgery was not timely developed by Defense Counsel nor presented. Ms. Mower was convicted when there is a strong probability that if evidence the income tax returns were forged had been presented to the jury, she would have been acquitted.

Defense Counsel failed to provide any modicum of an individualized defense. Instead, Defense Counsel took a back seat as Tom Mower's counsel drove the defense – not in Ms. Mower's best interests, but in Tom Mower's interest. (*See* Tenth Circuit Court Docket, Reply Brief of Appellant Leslie D. Mower, Exhibit 1.)

To convict Ms. Mower of tax evasion, the government needed to prove beyond a reasonable doubt: (1) there was a substantial tax deficiency due and owing; (2) the defendant committed an affirmative act to evade or defeat substantial additional individual income tax that was due and owing; and (3) the defendant willfully attempted to evade and defeat such tax. *See* 26 U.S.C. § 7201 (2007); *see also Sansone v. United States*, 380 U.S. 343, 351 (1965); *Spies v. United States*, 317 U.S. 492, 496 (1943) (the elements of § 7201 are "willfulness, existence of a tax deficiency, and an affirmative act constituting an evasion or attempted evasion of the tax"). "Willfulness requires proof beyond a reasonable doubt a person acted voluntarily, intentionally and with specific intent to do

something legally forbidden; that is with a purpose either to disobey or to disregard the law." *United States v. Afflerbach*, 547 F.2d 522, 524 (10th Cir. 1976). Negligent conduct, even gross negligence, a mistake, misunderstanding, or a good faith belief, even if unreasonable, is insufficient. *United States v. Hogan*, 861 F.2d 312, 315 (1st Cir. 1988). An affirmative act of evasion "requires more than the passive failure to file a tax return; rather, it requires a positive act of commission designed to mislead or conceal." *United States v. Meek*, 998 F.2d 776, 779 (10th Cir. 1993).

As the District Court pointed out at the evidentiary hearing, while the government did not have to prove Ms. Mower actually signed the tax returns at issue, "signing false tax returns would be evidence that Ms. Mower committed an affirmative act of evasion." (Appendix Exhibit 2, p. 10a.) Needless to say, the opposite must also be true. If the tax returns at issue **were not signed by Ms. Mower**, the government **could not use** that evidence as an affirmative act of evasion. In addition, Defense Counsel could have used the forged tax returns **to show she had not committed an affirmative act and there was no willfulness** on her part. The facts that support the forgery defense raise reasonable doubt as to Ms. Mower's participation in any alleged conspiracy or willful income tax evasion. A COA must be granted in these circumstances so that the merits of Ms. Mower's claims can be fully addressed on appeal.

Indeed, if Defense Counsel would have submitted evidence to the IRS that Ms. Mower's signatures on the income tax returns were forged, it is reasonable to

believe the IRS may not have sought an indictment against her. Similarly, if an indictment had already been issued, and the government had been informed that Ms. Mower's signatures on the income tax returns were forged, the IRS may have reconsidered proceeding against her and used that information in its prosecution of Tom Mower and Thompson.

In the government's opening statement in the criminal trial, it told the jury that Ms. Mower willfully evaded her personal income taxes for the years of 1992 through 1997 by "filing these false and fraudulent tax returns." (*See USA v. Mower, et al.*, U.S. Dist. Case No. 2:02-cr-00787, (hereinafter "Trial Court Docket"), Trial Transcript (hereinafter referred to as "Trial Tr."), Opening Statements, March 7, 2005, 17:13-16.) The government again stressed the importance of the tax returns in its closing statements. The government told the jury that Ms. Mower took affirmative acts to evade taxes by the "filing of individual tax returns." (*See* Trial Tr., Vol. IX, March 17, 2005, 1194:18-19.)

When addressing the willfulness prong in closing arguments, the government simply told the jury that "[b]ack in 1993 and 1994, they [the defendants] knew that the law forbid you from not reporting your income." (*Id.* at 1194:25-1195:1.) These references can only be to the filing of the 1993 and 1994 income tax returns – the very tax returns discussed in the Expert report. Defense Counsel failed to use that report, despite the fact that it stated that Ms. Mower did not sign those returns. The government's case against Ms. Mower relied on her participation in a conspiracy to avoid payment of taxes and in signing her name to the

returns that were filed. In spite of the government's telegraphed strategy, Defense Counsel failed to present an alternative the jury could consider. By giving up on Ms. Mower's defense in favor of Tom Mower's defense strategy, Defense Counsel abandoned their client. This on its face is unreasonable.

Defense Counsel's conduct in the preparation and trial deprived Ms. Mower of her right to effective counsel. In addition, when Ms. Mower sought a new trial based on Defense Counsel's ineffective representation, the District Court refused to consider Ms. Mower's right to a zealous defense. Instead, it focused on Defense Counsel's reputation, ignoring all evidence of sub-standard conduct. Reputation is irrelevant to whether Ms. Mower had a unique, exculpatory defense which the jury did not hear. Reputation is irrelevant to whether Ms. Mower received an independent, personal defense. The District and Circuit Courts gave "excessive" deference to Defense Counsel's professional reputation and failed to apply this Court's standards in *Slack* and *Strickland*, as set forth above. Reasonable jurists would agree Ms. Mower's constitutional rights were violated.

The issue before the District Court was not whether Defense Counsel were good lawyers or whether they had good reputations, but whether Ms. Mower received effective representation IN THIS CASE. The District Court's misplaced focus is apparent from the very beginning of the hearing when it indicated the "most important testimony" was Kaplan's. (*See* H. Tr., 11:2.) The District Court

showed its excessive deference to Defense Counsel when it prefaced Kaplan's testimony by stating:

> "I know, having dealt with you for many years, I need to say no more, except you will answer, as I know you will, fully and completely ...."

(*See* H. Tr., 12:22-24.)

Moreover, several times during the hearing, when it appeared Kaplan might testify to his detriment, the District Court intervened, interrupting counsel's examination and instead asking leading questions, transparently designed to elicit testimony favorable to Kaplan's interests. For instance, when the government was questioning Mr. Kaplan about presenting plea offers to Ms. Mower, the District Court stated:

The Court:	Was there ever a time when you got what you thought was something fairly concrete as an offer that you did not present it to Ms. Mower?
The Witness:	Never.
The Court:	Would that be something that would be quite contrary to the way you behave as a criminal defense attorney?
The Witness:	Yes.

(*See* H. Tr. 18:17-24; *see also* 21:2-15; 24:2-4; 34:18-22; 35:7-10; 63:5-7.) Further, while Kaplan was being examined by Ms. Mower's counsel at the hearing, the

District Court interrupted a line of potentially damaging questions, stating:

The Court:	Wait, wait, wait, wait, wait. Was she not allowed to testify, Mr. Kaplan?
The Witness:	That's not a correct statement, your honor.

(*See* Hr. T., 38:10-13.) The District and Circuit Courts neglected Ms. Mower's constitutional protections because it confused protection of a defendants' right to effective counsel with deference to a lawyer's reputation. That was wrong.

III. Defense Counsel's failure to call witnesses in Ms. Mower's defense, failure to present settlement offers, and refusal to allow Ms. Mower to testify constituted ineffective assistance of counsel.

"[A]n attorney must engage in a reasonable amount of pretrial investigation and [ ], at a minimum, interview potential witnesses and make an independent investigation of the facts and circumstances in the case." *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994) (internal quotations and alterations omitted). "[T]he failure to investigate a potential defense strategy without any strategic basis for doing so may constitute ineffective assistance." *See Strickland*, 466 U.S. at 690-91.

If a defendant's characterization of a witness' potential testimony is accurate and the witness is willing to so testify, then the defendant has a strong

argument that the defense counsel's failure to interview the witness and call him as a witness at trial fell below the standard of a reasonably competent attorney. *Harrison v. Quarterman*, 496 F.3d 419, 425 (5th Cir. 2007). A court would be "hard pressed to understand how [defense] counsel's failure to call [individuals whose testimony would support the innocence of the defendant and would not be cumulative of evidence already presented] as trial witnesses ... could be construed as reasonable trial strategy." *Snow v. Sirmons*, 474 F.3d 693, 729 (10th Cir. 2007).

A. Annette Jenkins' testimony.

Defense Counsel failed to follow up on Annette Jenkins' ("Jenkins") trial testimony that Ms. Mower's signature on the 1994 income tax return used by the government was forged. Before trial, Jenkins met with Defense Counsel and discussed the 1994 tax return. (*See* District Court Docket, no. 2, Exhibit C, ¶ 15.) It was at that meeting she discovered that the 1994 tax return used by the government was not the return she had prepared. (*Id.*) However, at trial, Defense Counsel only elicited a passing remark that Jenkins was "not too sure about [Ms. Mower's signature]" on the 1994 tax return. (*Id.*, at ¶ 17; *see also* Trial Tr. 342:20-21.) Knowing the Expert identified the 1993 and 1994 tax returns as forged, Defense Counsel could and should have asked Jenkins about the issue of forgery. Further, they should have at the very least re-questioned Jenkins regarding the 1993 signatures or 1994 signature.

Competent defense counsel would have extracted any exonerating information from a cooperative witness during cross-examination. The failure to follow up on this defense, both by inadequately investigating it before trial and by not presenting evidence at trial, were errors of such a fundamental nature as to deprive Ms. Mower of effective assistance of counsel in this case.

B. Allen Davis' testimony.

Ms. Mower's Defense Counsel failed to call Allen Davis ("Davis"), a crucial witness, to testify in Ms. Mower's defense to the forgery of Ms. Mower's signatures. The government relied on deposits into the Rezults account to show willfulness on the part of Ms. Mower. (*See* Trial Tr., 1182:17-24.) The truth regarding the Rezults account is that Ms. Mower opened the account years earlier and thought it was idle. (*See* District Court Docket, no. 2, Exhibit D, ¶ 32.) Upon investigation, it was discovered that Tom and Tom Mower, Jr. were using that account without Ms. Mower's knowledge. (*Id.* at ¶ 33.) The monthly statements were mailed to Tom Mower, Jr.'s home. (*Id.*) Davis obtained copies of the cancelled checks and discovered that Tom Mower, Jr. had signed several of the checks. (*Id.* at ¶ 34.) Ms. Mower had no knowledge about the deposits into the account or the checks written from it. (*Id.* at ¶ 35.) Davis further remembers "being in Thomas Mower's secretary's office, who was named Patricia Anderson, and seeing a notepad with practiced signatures hundreds of times of Ms. Mower's signatures on it. Ms. Anderson told [Davis] that she was learning how to duplicate Ms.

Mower's signature." (*Id.* at ¶ 36.) Davis told Ms. Mower's Defense Counsel about this forgery incident and expected this information to be presented at trial, either through his testimony or through other corroborating witnesses. (*Id.* at ¶ 37.)

Defense Counsel's failure to present this evidence was unreasonable. It would have shown that Tom Mower either forged, or had someone else forge, Ms. Mower's name to the tax returns. None of this evidence was presented to the jury. This failure is the exact type of ineffective conduct which falls below the standard of a reasonable competent attorney. *Harrison*, 496 F.3d at 425; *see also Snow*, 474 F.3d at 729 (A court would be "hard pressed to understand how [defense] counsel's failure to call [individuals whose testimony would support the innocence of the defendant and would not be cumulative of evidence already presented] as trial witnesses ... could be construed as reasonable trial strategy.")

C. Failure to present settlement offers.

The Utah Rules of Professional Conduct require a lawyer to promptly inform the client of any decision or circumstance with respect to the client's informed consent, including keeping the client reasonably informed about the status of the matter and explaining the matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation. Utah R. Prof. Con., Rule 1.4(a) (2008); *see also* ABA R. Prof. Con., Rule 1.4(a.) (2008). Further, in the Comment section to Rule 1.4, a lawyer who receives from opposing counsel a proffered plea

bargain in a criminal case must promptly inform the client of its substance. *Id.* Here Defense Counsel failed to present settlement offers from the government to Ms. Mower.

After Ms. Mower retained Defense Counsel, they had numerous discussions with the government about the charges against Ms. Mower. (*See* H. Tr., 15:5.) Defense Counsel had discussions with the government during the pre-indictment phase and the government presented an oral plea offer during that time. (*Id.* at 68:12-23.) The plea offer consisted of Ms. Mower pleading to one count of tax evasion and, in turn, the government recommending to the court that Ms. Mower receive no jail time. (*Id.* at 15:6-11.) However, Defense Counsel never discussed or recommended the offer to Ms. Mower. (*Id.* at 68:16-23.) After an indictment was returned against Ms. Mower, Defense Counsel received a written offer that Ms. Mower would serve two years jail time and accept a felony conviction. (*Id.* at 17:13-21.) Defense Counsel claim they informed her of this written offer, but did not show her the letter or give her a copy of it. (*Id.* at 70:8-10; 113:24-114:9.) Further, they failed to apprise Ms. Mower of the most important sentence in the written offer, the fact that if she cooperated, she could receive a reduction in time or no time at all. (*Id.* at 91:14-25, 92:1-11, 70:4-10.)

This was essential information and Ms. Mower received no communication about it. When confronted about this during the motion hearing, Defense Counsel offered the excuse that Ms. Mower traveled a lot and therefore she couldn't be reached. (*See* H.Tr. 62:17-23,

97:3-8, 99:22-25.) Ms. Mower testified that while she did travel often with her work, she was always available by cellular telephone. (*Id.* at 62:6-7.) There simply is no excuse for failing to fully apprise a client of a settlement offer. Certainly Ms. Mower was prejudiced by not having the settlement offer presented to her. The District Court failed to take any of this evidence into account, instead relying on Defense Counsel's testimony and vague descriptions in their billing records, which indicate they traveled to Provo and met with Ms. Mower. (*See* Appendix Exhibit 2, p. 14a-15a.) The District Court did not even mention any of Ms. Mower's testimony in its decision, thereby wholly discounting Ms. Mower's account and relying solely on Defense Counsel's "very credible" testimony. (*Id.* at 14a.) This was error. Ms. Mower's testimony is equally as important as Defense Counsel's, particularly where there is no documentary proof, no billing record, document, fax cover sheet, or letter indicating Defense Counsel presented Ms. Mower with the plea offers. The lack of any record supports Ms. Mower's contention that she was never informed of any plea offers from the government.

D. Refusal to allow Ms. Mower to testify in her own defense.

In a criminal case, an attorney shall abide by the client's decision, after consultation with the attorney, as to whether the client will testify. Utah R. Prof. Con., Rule 1.2(a) (2008); *see also* ABA R. Prof. Con., Rule 1.2(a.) (2008). Although the attorney can discuss the pros and cons of the client testifying, the client has the ultimate authority to determine the purposes to be served by legal representation and the attorney cannot

refuse or prevent the client from testifying if that is his or her desire. *Id.*

Ms. Mower wanted to testify at her trial. (*See* H.Tr. 71:6-25.) She discussed the option with Defense Counsel before trial, who determined before trial it was not in her best interests. However, Ms. Mower asked to testify during trial, after hearing Jenkins testimony that the 1994 tax return was not prepared by Jenkins and did not bear Ms. Mower's signature. (*Id.* at 71:21-25.) Kaplan denied her request. (*Id.* at 23:16-20; 71:1-8.) When she made this request, she was unaware that Defense Counsel had hired a handwriting expert. (*Id.* at 78:11-21.) She was also unaware that the handwriting expert had determined that her signatures on the 1993 and 1994 tax returns were forgeries. (*Id.* at 81:8-14.) She was dissuaded by Defense Counsel from testifying while they withheld critical information from her, preventing her from making an informed decision about testifying.

The District Court again erred in denying Ms. Mower's § 2255 petition. It stated that "although Ms. Mower claims she wanted to testify, she has pointed to no specific facts that she needed to convey to the jury." (*See* Appendix Exhibit 1, p. 10.) Ms. Mower's constitutional right to testify is not based on whether there were any specific facts she needed to convey. She had an absolute right under the United States Constitution to testify in her own behalf, a right of which Defense Counsel deprived her. Thus, the Tenth Circuit erred in denying a COA. This Court should reverse the Tenth Circuit and remand for a COA.

CONCLUSION

Based on the foregoing, Petitioner, Leslie D. Mower, respectfully requests this Court accept her Petition and grant Certiorari to review the issues affecting her rights.

Respectfully Submitted.

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December 2009

APPENDIX

APPENDIX EXHIBIT 1

ORDER DENYING CERTIFICATE OF APPEALABILITY

Dated August 12, 2009

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LESLIE D. MOWER, Defendant-Appellant.	No. 08-4178 (D.C. Nos. 2:08-CV-00005-TC & 2 :02-CR-00787-TC-SA-2) (D. Utah)

ORDER DENYING CERTIFICATE OF APPEALABILITY

Before **HARTZ**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and **TYMKOVICH**, Circuit Judge.

Leslie D. Mower was convicted on one count of conspiracy and six counts of tax evasion for tax years 1992-1997. She was sentenced to twenty-seven months imprisonment and thirty-six months of supervised release. We affirmed her conviction and sentence on direct appeal. *See United States v. Thompson*, 518 F.3d 832 (10th Cir.), *cert. denied*, 129 S. Ct. 487 (2008).

While her direct appeal was pending, Ms. Mower filed a motion under 28 U.S.C. § 2255 to vacate her sentence based on ineffective assistance of trial counsel. After an evidentiary hearing, the district court denied relief. In order to appeal that decision, Ms. Mower must obtain a certificate of appealability (COA). *See* 28 U.S.C. § 2253(c)(1)(B) (requiring COA to appeal a final order in a § 2255 proceeding). She filed a motion for a COA in the district court, but the court did not rule on it. Accordingly, we deem that motion denied. *See* 10th Cir. R. 22.1(C). Ms. Mower did not file a motion for a COA in this court, but her notice of appeal constitutes such a request. *See* Fed. R. App. P. 22(b)(2).

The issuance of a COA is a jurisdictional prerequisite to an appeal from the denial of a § 2255 motion. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make this showing, Ms. Mower must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation marks omitted). For substantially the same reasons set forth by the district court in its August 22, 2008, Memorandum Opinion and Order Denying § 2255 Petition, we conclude that Ms. Mower has not met the requirements for a COA.

To prevail on her claim of ineffective assistance of counsel, Ms. Mower has the burden of showing by a preponderance of the evidence that counsel's performance fell below an objective standard of reasonableness, *Strickland v. Washington*, 466 U.S. 668, 688 (1984), and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. Ms. Mower's first contention assails the district court's application of the standard of review under *Strickland*. She contends that the court applied a heightened standard of review to her ineffective assistance claims by stating that its "review of counsel's performance must be highly deferential." Aplt. Br., Ex. 1, at 2. We disagree. The district court's deference to counsel's performance accords with the Supreme Court's direction that in making the determination under the first prong of *Strickland*, "court[s] should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *See Strickland*, 466 U.S. at 690. We see no error in the district court's standard of review.

Ms. Mower also argues that trial counsel (1) failed to adequately investigate whether her signatures on tax returns and certain checks were forged; (2) failed to call expert witnesses; (3) failed to present any witness testimony in her defense; (4) failed to present her with settlement offers; and (5) refused to allow her to testify. Having reviewed the entire appellate record and the parties' arguments under the applicable legal framework, we conclude that the district court's resolution of these issues is not reasonably subject to

debate and that the issues Ms. Mower seeks to raise on appeal are not adequate to deserve further proceedings. We therefore **deny** Ms. Mower's request for a COA and **dismiss** this appeal.

Entered for the Court

/S/
Timothy M. Tymkovich
Circuit Judge

APPENDIX EXHIBIT 2

MEMORANDUM OPINION AND ORDER DENYING § 2255 PETITION

Dated August 22, 2008

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

LESLIE D. MOWER, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	**MEMORANDUM OPINION AND ORDER DENYING § 2255 PETITION** Civil Case No. 2:08-CV-00005-TC Criminal Case No. 2:02-CR-00787-TC-SA

On March 18, 2005, Petitioner Leslie Mower was convicted by a jury of one count of conspiracy (18 U.S.C. § 371) and six counts of tax evasion (26 U.S.C. § 7201). On September 13, 2006, the court sentenced Ms. Mower to 27 months of incarceration, followed by 36 months of supervised release. The court also imposed a $60,000 fine. Ms. Mower appealed her conviction to the Tenth Circuit Court of Appeals. On March 12, 2008, the Tenth Circuit affirmed her conviction. See United States v. Thompson, 518 F.3d 832 (10th Cir. 2008).[1]

[1]Because the Tenth Circuit gave a thorough discussion of the facts in its opinion, the court will not repeat them here except to explain its order.

Ms. Mower has now filed this motion under 28 U.S.C. § 2255.[1] She claims that she received ineffective assistance of counsel before trial, during trial, and at the sentencing hearing.

In an earlier order, the court found that Ms. Mower had failed to establish that she received ineffective assistance of counsel at the sentencing hearing. (2:08-CV-00005, Dkt. # 26.)

On June 13, 2008, the court held an evidentiary hearing on Ms. Mower's remaining claims. Ms. Mower's two trial attorneys, Neil Kaplan and Anneli Smith, testified. Ms. Mower also testified. The court has determined, based on the evidence at the hearing, review of relevant parts of the trial transcript and exhibits, and the applicable law that Ms. Mower has failed to establish any of her claims of ineffective assistance of counsel. In fact, although Ms. Mower was convicted, a result with which she is understandably unhappy, it is strikingly clear to the court that Ms. Mower's trial attorneys provided her a thorough, energetic and highly skilled defense.

ANALYSIS

"To establish ineffective assistance of counsel, a defendant must show both that his counsel's

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[1] In December 2007, Ms. Mower filed an "Expedited Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255." (2:08-CV-00005-TC, Dkt. # 1.) Then, in February 2008, Ms. Mower filed a "Supplemental Brief in Support of Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255." (2:08-CV-00005-TC, Dkt. # 15.)

performance was constitutionally deficient, and that this deficient performance prejudiced him." United States v. Harfst, 168 F.3d 398, 402 (10th Cir. 1999) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). "An ineffective assistance claim may be resolved on either performance or prejudice grounds alone." United States v. Kennedy, 225 F.3d 1187, 1197 (10th Cir. 2000) (citing Fox v. Ward, 200 F.3d 1286, 1295 (10th Cir. 2000)).

To satisfy the first prong of this test, a defendant must show that his "counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. For the second prong a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

A court's review of counsel's performance must be highly deferential. "There is a strong presumption that counsel provided effective assistance, and a section 2255 defendant has the burden of proof to overcome that presumption." Kennedy, 225 F.3d at 1197 (quoting United States v. Williams, 948 F. Supp. 956, 960 (D. Kan. 1996)). It is well-established that actions or omissions that "might be considered sound trial strategy" do not constitute ineffective assistance of counsel. Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

Ms. Mower's remaining claims of ineffective assistance of counsel claims are:

1) Counsel failed to call an expert witness to testify;

2) Counsel failed to call any witnesses to testify on Ms. Mower's behalf;

3) Counsel failed to properly instruct the jury[3];

4) Counsel failed to present settlement offers to Ms. Mower; and

5) Counsel refused to let Ms. Mower testify.

INEFFECTIVE ASSISTANCE

1. PERFORMANCE

Expert testimony

Ms. Mower argues that her attorneys were ineffective because they failed to present expert testimony that the signatures on her 1993 and 1994 personal tax returns[4] were not Ms. Mower's but were forged. Although the government did not have to prove that Ms. Mower actually signed the returns, signing false tax returns would be evidence that Ms. Mower committed an affirmative act of tax evasion.

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[3] This argument is easily disposed of because Ms. Mower unsuccessfully raised it on appeal. United States v. Thompson, 518 F.3d 832, 864-66 (10th Cir. 2008). The law is well- settled that, absent an intervening change in the law, issues raised on appeal cannot be raised in a § 2255 motion. United States v. Prichard, 875 F.2d 789, 791 (10th Cir. 1989).

[4] To the extent that Ms. Mower might now have expanded the scope of her claim to include the signatures on all of the tax returns at issue in her trial, the court's analysis and conclusion is the same.

Defense counsel hired a forensic document examiner, David Oleksow, to examine the signatures on the 1993 and 1994 returns. He concluded, after comparing Ms. Mower's known signature to those on the returns, that "[t]he questioned signatures . . . show a strong indication of being written by someone other than . . . Leslie Mower . . . . Auto forgery[6] cannot be ruled out." (Hr'g Ex. 6 at 15.)

Defense counsel did not call Mr. Oleksow at trial. Mr. Kaplan explained the reason he and Ms. Smith decided not to call Mr. Oleksow: A government witness, Annette Jenkins, testified at the trial (contrary to her grand jury testimony) that the signature on Ms. Mower's 1994 tax return did not appear to be Ms. Mower's. Moreover, during an interview with a Special Agent for the IRS, Ted Elder, Ms. Mower had admitted that the signature on the tax return was hers. Apparently, the government would not be able to introduce that evidence unless Ms. Mower or another witness, such as a handwriting expert, testified that the signature was not Ms. Mower's. Mr. Kaplan explained:

> We were concerned that that [the handwriting expert's anticipated testimony] was wishy-washy testimony, which [we] were prepared to use if we had nothing else to fall back on. But when Annette Jenkins said it wasn't Mrs.

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[6] "Auto forgery"occurs when a person signs his or her signature but tries to make the signature look forged. (Hr'g Tr. 27, June 13, 2008.)

> Mower's signature, and the government could not introduce Agent Elder's interview where Mrs. Mower said it was, we thought we had a good record that she had not signed the 1994 return and [we] did not want to muddy the record.

(Hr'g Tr. 27.)

Ms. Mower also argues, as somewhat of a side issue, that a handwriting expert was necessary to show that she did not sign certain checks deposited in an account called "Resultz." But whether Ms. Mower did or did not sign some of the checks that were deposited into that account was not significant. As the government points out:

> The Resultz checks were but four of hundreds of US, Australian and Malaysian commission checks which Ms. Mower endorsed and deposited into various bank accounts. The disposition of these checks into her personal checking and savings accounts, as well as other bank accounts, and the failure of Ms. Mower to report the receipt of these checks as income on any tax return, corporate or otherwise, is the evidence which linked her to the conspiracy and tax evasion charges.

(Gov't Resp. 5, 2:08-CV-00005, Dkt # 43.)

Moreover, the main question was not who signed the checks but who actually controlled the Resultz account. Mr. Kaplan explained, "There was an issue . . . over who controlled the Resultz account, whether it

was Mrs. Mower or Mr. Mower . . . . And the testimony at the trial was that Mr. Mower controlled it completely. His personal assistant, Patricia Anderson, testified that he received those checks. He deposited them or she deposited for him." (Hr'g Tr. 43-44.)

Finally, Ms. Mower apparently told her attorneys that she had signed some of the Resultz checks. (Id. at 43.)

Based on the record, it is clear to the court that Ms. Mower's attorneys' decision not to call the handwriting expert was sound trial strategy.

Other Witnesses

Ms. Mower contends that her attorney was ineffective by failing to "present critical evidence . . . regarding the back-dated loan document presented to the IRS, commission payments from Australia, the phone call from Leslie Mower regarding the commission checks in Australia, the Resultz account . . . ." (Mem. Supp. Mot. Vacate 10, 2:08-C V-00005-TC, Dkt. # 2.) Ms. Mower relies on the affidavit of Allen Davis to support her argument. (Mem. Supp. Mot. Vacate, Ex. D.) But Ms. Mower really appears to be arguing, not that her attorneys should have called other witnesses, but that on cross-examination, Ms. Mower's attorneys should have asked Mr. Davis additional questions that would have exculpated Ms. Mower.

Mr. Davis testified at trial as a government witness under a grant of immunity. But after examination of Mr. Davis' testimony at trial and his affidavit filed in

support of Ms. Mower's motion, the court concludes that in his cross-examination of Mr. Davis, Ms. Mower's attorney elicited testimony that was generally helpful to Ms. Mower, showing that Ms. Mower was relatively uninformed about the transactions that the government claimed were central to the tax evasion counts. (See Trial Tr. vol. 5, 652-54, Mar. 11, 2005, 2:02-CR-00787.) Nothing in the record supports Ms. Mower's arguments that her attorneys' decision to end their questioning of Mr. Davis when they did was ineffective assistance of counsel.

Settlement Offer

Ms. Mower claims that her attorneys did not present her with settlement agreements offered by the government. Her attorneys unequivocally testified that they presented all settlement agreements to her. The court found her attorneys very credible. Additionally, her attorneys had records evidencing that they presented all concrete plea offers to Ms. Mower.

Mr. Kaplan testified that before Ms. Mower was indicted, the government proposed that in exchange for Ms. Mower's testimony at trial, the government would recommend "no jail" time. (Hr'g Tr. 95.) Both Ms. Smith and Mr. Kaplan testified that when they presented the offer to her, Ms. Mower refused and, when they told her she faced the possibility of prison, "Mrs. Mower started crying . . . . And then . . . she said, 'I'll just write a book in prison.'" (Id. at 16- 22, 96.)

Following the return of the indictment, Ms. Mower's attorneys and the government continued to talk about a possible plea agreement. Mr. Kaplan

testified: "We had continuing discussions with Mrs. Mower up until probably almost the time of trial about that [the advantages of pleading guilty], but we understood and respected her decision that she did not want to plead guilty." (Id. at 18.) When the court asked him whether he had ever not presented a "concrete" offer to Ms. Mower, Mr. Kaplan replied emphatically, "Never." (Id.)

Ms. Smith testified that "[w]e would always communicate it [any plea offer from the government] to Mrs. Mower the next time we saw her. There were large periods of time when actually we had very little contact with her because of her international travel with her business. But we would communicate all offers the next time that, you know, we saw her. We usually did those in person." (Id. at 97.) When asked whether she had presented plea offers to Ms. Mower, Ms. Smith answered, "I have been a defense attorney for a really long time, and we always present plea offers to our clients because it's their choice." (Id. at 95.)

Ms. Mower's attorneys had various records and documents that supported their contention that they always presented plea offers to Ms. Mower. Mr. Kaplan testified that he presented the "no jail" offer to Ms. Mower on September 13, 2004. A billing record for Mr. Kaplan's and Ms. Smith's law firm, had the following entries:

> 09/13/2004 ARS Travel to Provo; meeting with client, corporate counsel, B. Grazier; phone conference with R. Hyde.

> 09/13/2004 NAK Office Conference with ARS; office conference with Leslie Mower et al; office conference with Bart Grassier; office conference with C. Crump; office conference with B. Murdock; review gross receipts documents.

(Hr'g Ex. 3.)

Mr. Kaplan explained that the record reflected a trip he and Ms. Smith made to Provo where they discussed a number of things with her, including the plea offer. (Hr'g Tr. 36.) In response to Ms. Mower's attorney's question why Exhibit 3 did not have more detail, such as "discussed D.O.J. offer," Mr. Kaplan testified, "It's our practice Mr. Snuffer, and that of I think a number of other lawyers that practice criminal defense, we keep those matters–we make more generic descriptions." (Id. at 38.)

Ms. Smith produced notes that she had taken during the September 13 meeting with Ms. Mower. On the first page Ms. Smith had written "plea offer." (Hr'g Ex. 9, CS025.) She testified that the notation meant that she, Mr. Kaplan and Ms. Mower discussed the plea offer on that date (Hr'g Tr. 99.) She also testified that she was "quite certain" that she and Mr. Kaplan took the letter from the prosecutor outlining the terms of the plea offer (Hr'g Ex. 1) to Provo and showed it to Ms. Mower. (Hr'g Tr. 99-100.)

Based on all the facts in the record, the court concludes that Ms. Mower's attorneys presented all plea offers to her.

Ms. Mower's Right to Testify

Ms. Mower claims that her attorneys refused to let her testify. Both Ms. Smith and Mr. Kaplan testified that they strongly advised Ms. Mower not to testify, despite the fact that they "thought on many levels that she would make a very good witness." (Id. at 24.) Mr. Kaplan testified that he never told her that she could not testify and he "thought she always agreed with us that she shouldn't testify. There were a lot of unexplained things which we did not feel, you know, showed guilt, but that were fodder for cross-examination." (Id. at 26.)

Her attorneys' main concern was deposition testimony that Ms. Mower had given in an earlier civil suit. According to Mr. Kaplan and Ms. Smith, Ms. Mower had admitted to them that she had testified falsely at the deposition that she had not received income from an entity called M.P. Trust. Her attorneys knew that she had received the income and when they asked Ms. Mower why she had given that deposition testimony, "she said that she was prepared to testify correctly, and that she was kicked under the table by her attorney, who was James Thompson [a co-defendant in the criminal trial]. And they took a recess, and he told her to lie because that was the only way they could win the case." (Id. at 25, 101-103.)[6]

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[6]Although at the hearing, Ms. Mower testified that her deposition testimony was not false, the testimony of Ms. Smith and Mr. Kaplan, and the notes Ms. Smith made when Ms. Mower recounted the incident when Mr. Thompson kicked her under the table, the court concludes that Ms. Mower's hearing testimony was not credible. (Hr'g Tr. 103-105, Ex. 9 at CS024.)

Ms. Mower's attorneys filed a motion under Federal Rule of Criminal Procedure 404(b) seeking to have the evidence of Ms. Mower's false deposition testimony excluded. The trial court agreed but indicated that if Ms. Mower testified, this evidence could be used to impeach her. (Id. at 24-25.)[7]

What's more, the evidence does not support Ms. Mower's contention that her attorneys refused to let her testify. Ms. Mower testified at the hearing that when a government witness, Annette Jenkins, testified at the trial, Ms. Mower said to Mr. Kaplan, "Oh my gosh. Let me testify . . . . Put me on the stand, Neil. I really feel like I really need to get up there and let the jury know." (Hr'g Tr. 71.) According to Ms. Mower, Mr. Kaplan refused. At most, if true, Ms. Mower's statements seem to indicate that in the heat of trial, during the testimony of an important witness, Ms. Mower excitedly asked her attorneys to let her testify and they refused. To the court, this conversation, if it occurred, is not determinative, particularly in light of her
attorneys' testimony on this issue. Mr. Kaplan denied that he did not allow Ms. Mower to testify. Instead, according to Mr. Kaplan, "Mrs. Mower followed our advice and agreed that she should not testify when we went over the pros and cons." (Id. at 38.) Ms. Smith testified that although Ms. Mower "always wanted to testify" (Id. at 105), neither she nor Mr. Kaplan ever refused to let Ms. Mower testify because: "That was always her decision, but we–our strong advice, because

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[7] In fact, the government listed this allegedly false deposition testimony as an over act in the indictment.

of this issue [the false deposition testimony] and the damage that we thought it would do in the context of that trial, was that she should not testify, but it was her decision." (Id.)

2. PREJUDICE

Even if Ms. Mower had shown that her attorneys' performance was not effective, which she hasn't, her motion would fail because she has not shown that she suffered prejudice as a result of any of her attorneys' claimed errors. Looking at her argument that her attorneys should have called a handwriting expert, the record shows that there was sufficient evidence before the jury, even without the expert, that Ms. Mower did not sign the 1994 tax return. And the question of whether she signed certain checks that were deposited in the Resultz account was not significant.

Similarly, nothing raised in the affidavits shows that the testimony that Mr. Davis would have given, if asked, seems relevant, particularly in view of Mr. Davis' clear bias in favor of Ms. Mower during his testimony. (The government was forced to impeach Mr. Davis several times throughout his testimony, even though he was called by the government.) Looking at her claim that her attorneys failed to inform her of various government plea offers, Ms. Mower testified at the hearing that she would not have accepted any plea offers by the government that would require her to plead guilty and be a felon. (Id. at 90.) And finally, although Ms. Mower claims she wanted to testify, she has pointed to no specific facts that she needed to convey to the jury and, in light of the substantial impeachment evidence that the government possessed,

it appears that her attorneys made a wise choice when they advised her not to testify.

For the above reasons, Ms. Mower's petition is DENIED.

SO ORDERED this 22nd day of August, 2008.

BY THE COURT:

/S/
TENA CAMPBELL
Chief Judge

APPENDIX EXHIBIT 3

ORDER

Dated October 2, 2009

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LESLIE D. MOWER, Defendant-Appellant.	No. 08-4 178 (D.C. Nos. 2:08-CV-00005-TC & 2 :02-CR-00787-TC-SA-2) (D. Utah)

ORDER

Before **HARTZ**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and **TYMKOVICH**, Circuit Judge.

Appellant's petition for rehearing is denied.

Entered for the Court,

Elisabeth A. Shumaker, Clerk